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STATEMENT
OF
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ATTORNEY GENERAL
BEFORE
THE
SUBCOMMITTEE ON CIVIL AND
CONSTITUTIONAL RIGHTS
COMMITTEE ON THE JUDICIARY
U. S. HOUSE OF REPRESENTATIVES

H.R. 10400
FBI CHARTER LEGISLATION

FEBRUARY 28, 1978

MORI/CDF

Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to discuss with you today the outlines of a legislative charter for the Federal Bureau of Investigation. To date so much attention has focused on the foreign intelligence and foreign counterintelligence responsibilities of the FBI and other agencies that the broader questions which must be considered in fashioning a charter for federal law enforcement have not been addressed. It is primarily these broader issues that I hope to discuss with you this morning.

The FBI's responsibility to collect information on the intelligence activities of other nations directed against this country, and to detect individuals engaged in espionage and sabotage, effect the entire intelligence community. Accordingly, I believe that such FBI activities should be considered in the context of legislation related to the intelligence community as a whole. Similarly, the work that the FBI undertakes in collecting positive intelligence on the activities of foreign nations is done at the request of the intelligence community. Thus, it too should, I think, be considered as part of the entire legislative package relating to that community.

We have been working closely with the Committees on Intelligence of both Houses to develop charter legislation for the intelligence community. This effort encompasses both the foreign intelligence and counterintelligence responsi-

bilities of the FBI. In that context, we are also addressing issues arising from the use of sensitive intelligence collection techniques. Many of the issues raised by intelligence charters are severable from the issues which must be faced in connection with a charter dealing exclusively with the law enforcement and other non-intelligence responsibilities of the FBI. I believe that the law enforcement charter effort can and should proceed on a parallel track with the intelligence charters, but it seems wise to keep charter legislation for these two areas separate to avoid confusion and unnecessary delay. Your hearings today are the first serious look that the Congress has taken in the charter context at the law enforcement and related aspects of the FBI's work. I am pleased to begin what will, I hope, be a thoughtful dialogue on some very difficult and important issues.

The FBI is and will remain the primary federal law enforcement agency. It is not, however, the only such agency. Federal law enforcement is scattered among a variety of federal agencies for both policy and historic reasons: for example, primary responsibility for enforcement of the drug laws is in the Drug Enforcement Administration; the Secret Service enforces counterfeiting laws; firearms and explosives violations are, for the most part, handled by the Bureau of Alcohol, Tobacco and Firearms of the Treasury; smuggling violations are handled by the Customs Service; Postal Inspectors investigate violations of the Postal laws. The threshold

question of whether this diversity of responsibility is wise and effective is now being addressed by the President's Task Force on Reorganization which is expected to report its recommendations this year. Obviously, decisions on those recommendations will affect the drafting of charters not only for the FBI but for the other agencies as well.

An equally fundamental issue, which is necessarily involved in a charter for the FBI, is the question of the appropriate reach of federal criminal law. This is the central issue in the entire effort to revise the federal criminal code. As we proceed with that code revision, we are, of necessity, rethinking and redefining the role of the FBI and other criminal law enforcement agencies. With Congressman Mann's Subcommittee on Criminal Justice now holding hearings on H.R. 6869, I hope this vital task will soon reach completion.

Even when we have codified our federal criminal laws and assigned responsibility for enforcing those laws, a number of issues will remain. There is the question of the scope of criminal enforcement responsibility -- the stage at which investigation is appropriate. We must also determine whether the FBI should undertake investigative and other responsibilities outside the criminal sphere. As you are aware, the FBI currently investigates civil matters for the Department

of Justice, conducts background investigations of various federal officers and employees, and provides support and assistance to state, local and even foreign investigative agencies. In discussing a charter for the FBI we must examine whether any or all of these functions should continue to be performed by the FBI, should be assigned to some other federal agency, or, indeed, whether they should be performed by the federal government at all. I want to discuss each of these areas with you.

I.

The most visible and best understood criminal investigative responsibility of the FBI is to identify and apprehend individuals who have committed specific violations of federal criminal law. Historically this has involved both uniquely federal offenses, such as embezzlement of federal funds, and offenses which also fall within the jurisdiction of state and local authorities, such as robbery of a federally-insured bank. In my view it is appropriate that the FBI retain jurisdiction to investigate both types of crime, but the emphasis for the future should be on the investigation of offenses which, because of their nature and scope, can be better handled at

the federal level. Routine offenses which can be investigated equally well by federal or local authorities should be left to the local law enforcement agencies.

The FBI also has responsibility to investigate on-going criminal enterprises, involving both past and future violations of law. These investigations focus not only on identifying and apprehending those responsible for past acts but also on identifying the leaders who plan the enterprise and anticipating their future criminal acts. The investigations encompass such areas as organized crime, political corruption, fraudulent schemes and terrorist enterprises. They tend to involve organizations, not individual criminals acting alone, and they are likely to be complex schemes covering wide geographic areas. Because of the sophistication of these schemes and their interstate nature, I believe the FBI is uniquely qualified to conduct these investigations. For the future we should have greater federal concentration in this area.

The FBI's investigative jurisdiction also extends to conspiracies to violate federal law even when no specific federal violation has yet occurred. Again, these investigations are likely to involve organized crime, schemes to

commit fraud, plans to corrupt the political process and terrorism. The focus of these investigations is not only on the individuals involved but also on anticipating and thwarting the crimes they plan. As with on-going criminal enterprises, the complexity of the plans and the interstate nature of most of the crimes involved warrant federal action. The jurisdictional limitations on most state and local law enforcement agencies make it difficult if not impossible for them to investigate these cases effectively. Moreover, many of them lack the training to deal with complex fraud schemes or sophisticated computer crime. The FBI can make far greater impact on this type of crime.

There are two other areas of FBI criminal investigative responsibility which should be mentioned specifically -- fugitive investigations and the collection of information on civil disorders. These differ from the regular criminal investigations in that they are primarily intended to provide assistance to state and local authorities rather than to serve as a basis for federal criminal prosecution.

While federal law makes it a criminal offense to flee a state in order to avoid prosecution, incarceration, or

testifying at a criminal trial, 18 U.S.C. 1073, it has been the practice of the federal government to return located fugitives to the state which has issued a warrant for them rather than to prosecute the separate federal offense. I believe this is sound policy. I also believe that the locating of these fugitives is a proper function of federal law enforcement which, not being bound by state jurisdictional limits, can better perform this duty.

The collection of information on civil disorders, while stemming from a different federal responsibility, is equally important. Article IV of the Constitution obligates the federal government to come to the assistance of the states in cases of domestic violence which are beyond the state's ability to control. Congress has specifically provided for military assistance in these circumstances, 10 U.S.C. 331-336, but has placed the obligation on the President to satisfy himself that the situation clearly warrants federal involvement. To discharge this responsibility the President must have accurate information as to the extent of the violence and the state's ability to respond. Presently, the Attorney General is responsible for providing this information and the FBI

is his agent for gathering the necessary facts. I believe this function must be performed by some agency of the federal government and, since the Attorney General serves as the legal adviser to the President on questions of federal intervention, it seems logical that the FBI should continue to obtain the facts on which the Attorney General's recommendation and the President's decision are based.

II.

The enforcement responsibility of the Attorney General is not, of course, confined to the criminal laws; neither is the responsibility of the FBI. Some federal statutes, such as those dealing with antitrust violations or frauds, provide both civil and criminal remedies. An increasing number of federal statutes provide civil relief to deter such conduct as deception of consumers, deprivation of civil rights, pollution and violations of economic regulations. Responsibility for enforcing these is vested in the various Divisions of the Department of Justice and, as the fact-finding arm of the Department, the FBI conducts the necessary investigation at the request of the Division responsible for enforcement. Moreover, the FBI will, on request, investigate to determine

the facts necessary to defend suits against the government in such areas as contracts and torts. As any attorney recognizes, it is as essential to develop the facts in civil litigation as it is in criminal cases. One may question whether the fact-finding process should be carried out by an arm of the Department other than the FBI but I believe it is beyond question that the Department must have the capability to conduct investigations in these cases. In my own view, the trained investigators of the FBI are the appropriate agency in the Department to perform this function. Surely it would be anomalous to direct our best investigative talent at enforcement of the criminal laws while bringing lesser efforts to bear on the enforcement of our civil rights laws.

III.

Another major area of FBI responsibility is the conduct of background investigations on various potential officers and employees of the federal government. The origin of its duties in this area is diverse. The FBI has always conducted background investigations on its own employees, not from any statutory mandate, but because it is customary that a law enforcement agency conduct checks of those who will work for

it to be sure that their character is suitable for employment. At the request of the Attorney General, the FBI also conducts the background investigations of attorneys and senior officials of the Department of Justice. Background investigations of presidential appointees are handled by the FBI as a matter of custom, although there is no statute or Executive Order requiring this. There are statutes authorizing the FBI to conduct background investigations of employees of certain specific agencies such as the Nuclear Regulatory Commission, the Energy Research and Development Administration, the National Aeronautics and Space Administration, the Arms Control and Disarmament Agency and ACTION. By Executive Order the FBI has been assigned responsibility for investigating federal employees or potential employees about whom a loyalty question has been raised as well as certain employees of international agencies such as the United Nations. E.O. 10450, E.O. 10422. At the request of the Judicial Branch, with approval granted by the Attorney General, the FBI does background investigations of officials such as referees in bankruptcy, U.S. Probation officers and U.S. Magistrates. This is done as a matter of accommodation. Similarly, background investigations are conducted on potential staff members

of certain congressional committees. There is no statutory base for providing this service but formal agreements have been entered into between some of the committees and the Attorney General. The Pardon Attorney also requests investigative assistance from the FBI concerning applications for pardons or executive clemency.

If there is any area of FBI responsibility in need of reexamination, formalization and clarification by statute, it is the conduct of background investigations. The Executive Orders in this area are outdated and troublesome in their language. The number of congressional committees requesting this service is growing. The time pressures on FBI field offices to complete some of these investigations almost certainly affects the performance of other investigative duties. Both the Executive and the Congress have allowed this area of responsibility to grow without sufficient attention. Clearly it is time that we reexamine the question whether the FBI should be conducting any of these investigations and, if so, which ones. Given the excellent job it does, it is understandable that appointing authorities would like to have the benefit of FBI background investigations, but these pose an increasing burden on our chief investigative agency. I hope the Reorganization Task Forces considering both law

enforcement and civil service reorganization will make recommendations on this subject.

IV.

Aside from its traditional investigative role, the FBI performs an important function in providing leadership and assistance to other law enforcement agencies. Some of this assistance is mandated by statute; other forms of assistance are a natural outgrowth of the FBI's unique role and stature in law enforcement in this country.

Congress has authorized the FBI to collect and disseminate information on crime and criminals, 28 U.S.C. 534. It does so by collecting and publishing statistics, issuing specialized reports on crime in the United States, and furnishing fingerprint and criminal history information to state and local authorities. Congress has also charged the FBI with providing training to state and local officials, 42 U.S.C. 3744. This is presently accomplished not only through the National Academy at Quantico but also through local training programs conducted by FBI field offices. I view these functions as essential to the improvement of law enforcement in this country. It might be argued that they could as well be

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performed by another agency. On the other hand, the FBI is obliged to perform some of these functions in aid of its own law enforcement mission and it might be duplicative to set up a separate agency to serve the state and local needs. We are already studying the question whether the crime statistic function should be transferred elsewhere. We need to study the other functions as well.

Other forms of assistance provided by the FBI have developed as a natural adjunct of its cooperation with other law enforcement agencies or as a result of its unique capability and expertise. For example, the FBI's Identification Division assists in the identification of victims of civil air disasters since it has the expertise and the largest single pool of fingerprints in the United States. Its laboratory provides assistance to state and local enforcement agencies, consistent with the primary mission of the laboratory to serve the FBI's own needs. Again we could question whether it is necessary that the FBI provide these services, but we must also ask whether it would be less efficient for some other agency to do so.

As a matter of comity the FBI will follow up leads, provide information or locate individuals on behalf of state, local or foreign law enforcement agencies. This is done, of

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course, in the interest of cooperation and for the purpose of securing the assistance of these agencies in FBI investigations. There is, however, no specific statutory authority to provide these services and there are no formal limits on the forms of assistance which may be provided or the types of cases in which it is appropriate to provide such assistance. In my view it would be desirable to spell out in statute both the authority to provide assistance and the limits of that assistance.

V.

I have described the current functions of the FBI at this length in order to emphasize the breadth and diversity of its current responsibilities and to suggest the issues we must all consider in fashioning the appropriate charter for the FBI.

As I noted at the outset, the primary emphasis in the charter discussion to date has been on legislation relating to the foreign intelligence and foreign counter-intelligence responsibilities of the FBI. We have been working with the Intelligence Committees of both Houses on this subject and are presently engaged in implementing the policies and procedures called for by the new intelligence

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Executive Order (E.O. 12036). In addition, we have worked closely with the Congress and with the intelligence community to develop the Foreign Intelligence Surveillance Act. This bill, which would establish a judicial warrant procedure for electronic surveillance in the intelligence field, can be considered the first piece of intelligence charter legislation. I am very hopeful that it will be enacted in this session of Congress.

Intelligence matters have received top priority because they are the most sensitive and because they involve areas in which the existing law is most in need of clarification. Our concentration thus far on these matters should not, however, be viewed as demonstrating a waning interest in broader FBI charter legislation. As I said earlier, we are committed to the development of legislative charters for all FBI activity, although I believe it most practical for this purpose to separate the intelligence areas from the rest of the FBI's responsibilities.

Last year we began efforts to draft legislation dealing with the domestic security investigations of the FBI. It quickly became apparent, however, that it is unsound, both legally and practically, to isolate this particular subject from other areas of FBI criminal investigative responsibility. There is no real difference between investigations of criminal enterprises bent on violence for political motives and criminal enterprises bent on violence to extend the influence

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of organized crime for economic gain. Murder, assault, bombing and extortion are weapons equally adapted to calling attention to a political cause or enforcing a loansharking or kickback agreement. Whatever the motivation, the same investigative techniques come into play in attempting to identify the persons or organizations behind these acts, determining who provides the leadership and bringing a halt to such crimes. The only distinction is that greater safeguards for the protection of First Amendment rights should be provided in the investigation of crimes undertaken for political reasons.

The criminal investigative responsibilities of the FBI must be viewed as a whole and must be treated as a whole in the charter drafting process.

Realizing this, it becomes clear that there are many issues to be considered in drafting a charter and many other agencies to be consulted. The OMB reorganization task force dealing with law enforcement has identified the agencies that will be affected by any decisions made with respect to FBI law enforcement responsibilities and is currently addressing some of the issues which must be faced. Similarly, the task force concerned with civil service responsibilities will

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almost certainly comment on the FBI's role in conducting background investigations, on its own initiative, at the request of other agencies, or on referral from Civil Service. We should have the benefit of these studies in preparing an FBI charter.

Even when the basic decisions are made on the assignment of responsibility among federal agencies, there are certain basic issues intrinsic in the drafting of any charter which must be addressed. Should the charter serve as a permanent statutory authorization for the activities of the FBI or should it be an operating manual on how to conduct those activities? Should it address such questions as when to conduct investigations and how to conduct them or leave these decisions to the Executive Branch? Obviously there are many possible approaches. H.R. 10400, the FBI charter bill introduced by Chairman Edwards, is cast as an authorization, but an exclusive authorization prohibiting all activities not mentioned. Moreover, it attempts to set a standard for investigation. The draft intelligence charter proposed by the Senate Committee on Intelligence contains much more detail, describing not only who may be investigated, but when, and using what techniques. The Executive Order

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on intelligence falls somewhere in between, listing certain activities which are prohibited and others which must be restricted, but leaving the detailed guidance on the conduct of investigations to be worked out by procedures to be developed within the Executive Branch. No final charter can be drafted until we decide the basic contours of what it should contain, and it may well be that we will reach different decisions depending upon the type of FBI activity covered by the charter.

I have not yet resolved all of these issues in my own mind. We have recently sworn in a new FBI Director, whose judgment and wisdom I greatly respect. I would want to discuss all of these issues with him and obtain his recommendations before proposing a specific legislative charter for the FBI. I am not suggesting that the consideration of a charter be delayed until all of this has taken place. It is important that we begin now to discuss these issues and to engage in the learning process which will aid us in formulating our decisions. What I am suggesting is that the subject is far more complex than originally anticipated. I think we must consider an FBI charter very carefully to ensure that the statute that is finally enacted will guarantee the American people the best possible service from the talented men and women of the FBI.